IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 17, 2003

STATE OF TENNESSEE v. TIMMY REAGAN

Appeal from the Circuit Court for Overton County
No. 4594 Lillie Ann Sells, Judge

No. M2002-01472-CCA-R3-CD - Filed May 19, 2004

The defendant, Timmy Reagan, appeals as of right from his convictions by a jury in the Overton County Circuit Court for first degree, premeditated murder and first degree murder by placing or discharging a destructive device or bomb. The defendant was sentenced to life in prison for each conviction, and the trial court ordered that his sentences be merged. He contends that: (1) the evidence is insufficient to support the convictions; (2) the trial court erred by denying his motion to suppress pictures of the victim; (3) the trial court erred by denying his motion for a change of venue; (4) the trial court erred by denying his motion for the appointment of a jury selection expert; (5) the trial court erred by not using the jury questionnaire that he prepared; (6) the trial court erred by admitting the victim's statements as dying declarations; (7) the trial court erred by allowing Dr. Charles Harlan to testify about the location of the dynamite when it detonated; (8) the trial court erred by allowing Agent Richard Campbell to testify; (9) the trial court erred by admitting into evidence a weather report for the date of the explosion; (10) Tennessee Code Annotated § 39-13-202(a)(3) is unconstitutional; (11) the judgments of conviction for premeditated murder and murder by the illegal placing of an explosive device should have been merged; and (12) the defendant is entitled to relief based on cumulative errors. We hold that the defendant's conviction for first degree murder should be affirmed. We also hold that in attempting to merge the first degree murder convictions, the trial court incorrectly entered two judgments of conviction instead of one that notes the merger of the counts. This case is remanded to correct the judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed as Modified; Case Remanded

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Larry M. Warner, Crossville, Tennessee, for the appellant, Timmy Reagan.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; William Edward Gibson, District Attorney General; and Owen G. Burnett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the death of the defendant's wife, Christy Reagan, when her car exploded on January 16, 2000. Ruth Reagan, the defendant's mother, testified that she lived with the defendant and the victim. She said that on January 16, 2000, she went to bed around 9:00 p.m. but awoke around 11:30 p.m. She said her husband, Shirley Reagan, told her that there had been a car accident. She said she heard the victim yell for help and saw that the victim's and the defendant's car was on fire. She said that the defendant left from the passenger side of the car and entered the house but that he did not say anything to her. She said she called 9-1-1 and went to the victim, placing a comforter over her. She said she and the next door neighbor, Letha Fletcher, waited with the victim and prayed with her until the ambulance arrived. She said the victim told her that the defendant had used dynamite and that Rutledge Smith had given the dynamite to him. She said she believed the victim had also told her that the defendant meant to detonate the dynamite. She said the defendant was in the bathroom while she waited with the victim for an ambulance.

On cross-examination, Ms. Reagan testified that the defendant enjoyed hunting arrowheads. She said Chris Reagan and Matt Hargis were about eight feet away from the victim while they waited for the ambulance. She said that Chris Reagan worked in construction and that it would not surprise her if he had used dynamite on a project. On redirect examination, Ms. Reagan testified that she had never noticed the defendant with dynamite before and that he had never used dynamite to look for arrowheads in the past.

Aletha Fletcher testified that she lived close to the defendant and his family and that she heard a loud noise about 11:30 p.m. on January 16, 2000. She said that she and her husband, Astor Fletcher, ran to the defendant's house and that she saw the victim lying in the yard with Ms. Reagan beside her. She said that she stayed with the victim, that they prayed together, and that the victim told her twice that the defendant had "done it on purpose." She said the defendant never checked on the victim while they waited for an ambulance.

Chris Reagan, the defendant's brother, testified that he lived about fifty yards from his parents' house and that on January 16, 2000, at about 11:30 p.m., he heard a thunder-like sound that woke him up. He said he looked out the window and saw a fire in his parents' driveway. He said he went to the driveway and pulled the victim from the burning car with the help of Mr. Hargis. He said he heard the victim tell his mother that the defendant was drunk and playing with dynamite. He said he also heard the victim say that they had fought over the dynamite. He said that two to three weeks before the victim's death, the defendant told him that he and the victim were having marital problems. He said the defendant told him that money was tight and that he also believed the victim was having an affair. On cross-examination, Chris Reagan testified that he and the defendant hunted arrowheads together. He said that when he saw his brother about twenty minutes after the explosion, the defendant was injured badly. On redirect examination, Mr. Reagan testified that he and his brother had never used dynamite when they looked for arrowheads and that they tried not to break the arrowheads in their searches.

Christy Reeder testified that her house was close to the defendant's house and that on January 16, 2000, at around 11:30 p.m., she heard a noise that shook her trailer. She said she and her boyfriend, Matt Hargis, ran to the defendant's driveway. She said she saw Ruth Reagan, who told her to go inside and check on the defendant. She said Ms. Reagan also told her that the defendant had exploded the dynamite. She said that when she went inside the house, she saw the defendant lying in the bathroom doorway, attempting to tie a sweater around his arm. She said that in her time around the defendant that night, he never showed any concern for the victim. On cross-examination, Ms. Reeder testified that when she was with the defendant, he said, "I can't believe the bitch did this." She also said the defendant was calm while he was wrapping the sweater around his arm.

Matt Hargis testified that he was at his girlfriend's trailer on January 16, 2000, when he heard an explosion that shook the trailer. He said he ran to the defendant's house and helped pull the victim from the burning car. He said he heard the victim tell Ms. Reagan that the defendant was drunk and had dynamite with him. He said the victim also said that she and the defendant were fighting when he exploded the dynamite.

Chris Taylor testified that he knew the defendant and had worked for the defendant's father occasionally over the past eight years. He said that a few months before the explosion, while he was waiting at the defendant's house for Shirley Reagan to be ready for work, the defendant showed him seven or eight sticks of dynamite inside an old grill. He said that around that time, he began distancing himself from the defendant because of the way the defendant was acting. He said the defendant told him that he believed the victim was having an affair and was upset about it. On cross-examination, he denied that the defendant's father fired him on September 10, 1999. He said, rather, that he quit about one week after the defendant showed him the dynamite. He acknowledged that the defendant told him that he was not sure how to detonate the dynamite at that time.

Norma Smith, the victim's mother, testified that she believed the victim was going to leave the defendant. She said that the victim was in the process of withdrawing her money from her 401K plan and that when she went to collect the victim's clothes from the defendant's house, some of the victim's clothes were missing.

Ronald Bowers testified that he was an inmate at the Overton County Jail because of a felony conviction for selling methamphetamine. He testified that while in jail, he talked to the defendant and that the defendant told him that he believed the victim was having an affair with an African-American man. He said the defendant told him the victim deserved what happened in the explosion because of the affair. He said the defendant also told him that the dynamite was for hunting arrowheads. He said the defendant told him that dynamite was unstable when it was transferred from cold to hot conditions and that he had dealt with dynamite many times. He said that he hunted for arrowheads as well but never used dynamite to hunt them and that he did not believe the defendant when he said that was the reason he had the dynamite. On cross-examination, Mr. Bowers testified that he contacted the TBI about his information on the defendant but that he was not receiving anything in return for his testimony.

Tennessee Highway Patrol Officer Marty Philpot testified that on January 16, 2000, he was dispatched to the defendant's house and that when he arrived, he saw a car engulfed in flames. He said he heard the victim screaming but did not hear her make any statements. He said he went inside the defendant's home and saw the defendant with his arm partially gone. He said the defendant cursed at him and told him to cut the cord off the vacuum and tie it around his arm to stop the flow of blood. He said the defendant never asked about the victim. On cross-examination, Officer Philpot testified that the defendant's blood was all over the house. He said he did not help the defendant tie the vacuum cord around his arm.

Jeffrey Garrett, a paramedic for the Overton County Ambulance Service, testified that on January 16, 2000, he responded to a dispatch to go to the defendant's house at 11:35 p.m. He said that he went inside and saw the defendant with a sweater and a cord wrapped around his arm. He said the defendant also had injuries to his lower, left abdomen and his outer left thigh. He said he was with the defendant for about twelve minutes before he was loaded into the ambulance and said he rode with the defendant to the hospital. He said the defendant never asked about the victim. Billy Breeding, also a paramedic in Overton County, testified that he assisted with the defendant's care but never heard the defendant ask about the victim.

Rebecca Emberton, a paramedic in Overton County, testified that she was dispatched to the defendant's house on January 16, 2000, and saw a car engulfed in flames. She said she treated the victim and saw that the victim's right arm had been amputated. She said the victim's right side, from her armpit to her thigh, was also burned badly. She said that when she asked the victim what had happened, she responded that it was dynamite.

Terry Lindsey testified that on January 16, 2000, he was an officer for the Overton County Police Department and responded to a call about a fire at the defendant's house. He said that when he arrived, he saw that the victim's arm was amputated and that she was burned very badly. He said that he then went inside the defendant's house and saw the defendant, who was also badly injured. He said that he found a hand and part of an arm about fifteen feet past the front, passenger side of the car. He said he also found a finger in front of the car. On cross-examination, Officer Lindsey testified that the defendant stated, "I told her not to do it."

Heather Coronette, the Acute Care Coordinator at Livingston Regional Hospital, testified that on January 16, 2000, she helped treat the defendant in the emergency room. She said that he was uncooperative with the staff and that they had to restrain him in order to treat him. She said the defendant told her to get away from him. She said that in the approximate sixty minutes she was with the defendant, he never asked about the victim. On cross-examination, Ms. Coronette acknowledged that the defendant had a tube inserted into his throat about fifteen minutes before leaving the emergency room, which prevented him from speaking.

Tracey Maxfield, an officer with the Overton County Sheriff's Department on January 16, 2000, testified that she arrived at the defendant's house with Officer Lindsey a little after 11:30 p.m. She said that a car was engulfed in flames and that the victim was lying to the left of the driver's side

of the car and covered with a blanket. She said that after the victim and the defendant were removed by ambulance, she investigated the area around the car and found meat, car parts, bones, and other body parts. She said a trail of blood led from the door of the defendant's house to the bathroom.

James Harris, a captain in the Overton County Sheriff's Department at the time of the explosion, testified that he arrived at the scene of the explosion after the victim and the defendant were transported to the hospital. He said that his first priority was to secure the perimeter and search for evidence. He said he also wanted to find possible eyewitnesses. He said he found what he believed to be a dynamite cap six feet away from the car. He acknowledged he had no training with crimes involving explosives.

Agent Russ Winkler of the Tennessee Bureau of Investigation testified that on January 16, 2000, he met with Deputy Harris at the hospital where the victim died. He said this case was the first dynamite-based homicide that he had investigated. He said that based on his interviews with witnesses, he believed Rutledge Smith gave dynamite to the defendant. He said that Smith had worked at Bullseye Drilling and Blasting, a company that used dynamite.

Debbie Wycoff, a forensic chemist for the Bureau of Alcohol, Tobacco and Firearms (ATF), testified that she found explosive residue on pieces of metal collected by Deputy Harris in the area where the defendant's car exploded. She said the residue was used in some types of dynamite. She said that the piece of metal that Deputy Harris found that he believed was a blasting cap was, in fact, a blasting cap. On cross-examination, she acknowledged that she had also referred to the blasting cap as a shock tube detonator.

Dr. Charles Harlan, a forensic pathologist, testified that he had performed between twelve and fifteen autopsies where the cause of death was dynamite. He said that the victim's right arm was amputated at the elbow and that she had injuries from the blast on her right chest wall, right abdominal wall, and right thigh. He said that the victim died because of blood loss from the right chest and right arm, which was caused by the dynamite explosion. He said that charred areas on the victim did not result in blood loss. He said that there was no charring or burning on the top of the victim's right hand, indicating it was not in a direct line with the blast. He said, though, that the burns to the palm of the victim's right hand and the lack of wounds on the heel of the hand were consistent with a defensive injury and that she may have been shielding her body from the explosive device when it went off. He said the defendant's amputated left hand had extensive blast injuries. He said that based on the injuries to the right side of the victim's body, he determined that the right side of the victim was closer to the explosion than the left side of the defendant. He said that of the twelve to fifteen autopsies he had performed that related to dynamite explosions, none of the deaths were accidental.

Bill Crinnian testified that he was a technical and shipping supervisor for the only company in the United States that manufactures dynamite, Dyno-Novel, and had participated in the use of dynamite at construction sites. He said that dynamite consisting of ethylene glycol dynitrate and nitroglycerin would be in a transitional and more volatile state if the dynamite became frozen. He

estimated, however, that the temperature at which the dynamite his company manufactured would need to reach to freeze would be twenty-one degrees below zero Fahrenheit. He said that dynamite was transported without temperature control devices in the trucks they used, indicating Dyno-Novel was not concerned with the temperature around the dynamite. He said that occasionally, nitrocellulose, used to hold dynamite together, would be left out of the process when making dynamite, and that this could cause the dynamite to leak. He said that the dynamite would leak within thirty minutes of not receiving the nitrocellulose and that the mistake would be detected before the dynamite left the factory. He said that high humidity levels could diminish the strength of dynamite. He said that the sticks of dynamite themselves are very sensitive to friction and that they can detonate just by rubbing them against metal. He said that if dynamite was wet, it could deteriorate.

On cross-examination, Mr. Crinnian testified that the manufacture and safety of dynamite had improved over the years. He acknowledged that if dynamite was not designed, stored, manufactured, or handled properly, it would not be safe. He said that they usually used wood instruments around dynamite because metal may create sparks which could ignite the dynamite. He said he did not believe that deterioration of dynamite would cause it to detonate. He acknowledged that every piece of dynamite produced was not perfect. He acknowledged that in an accident where ammonium nitrate leaked from the dynamite and mixed with fuel, six hundred people had died. He agreed that if nitroglycerin leaked from the dynamite, it was much more dangerous than if ammonium nitrate leaked out. He acknowledged that once dynamite is used, it cannot be analyzed to determine if something leaked out. He said dynamite could last from thirty minutes to ten years, depending on how it is manufactured and stored. He said that he had worked on one other case in which dynamite accidentally killed a person and that friction caused that accident. He acknowledged that deteriorated or damaged explosive material may be more dangerous than explosives in good condition and that dynamite was a hazardous material. On redirect examination, Mr. Crinnian testified that he would not be concerned with handling dynamite in freezing temperatures. He said that if dynamite became wet and then dried out, it would be the same as if it were fresh dynamite. On recross-examination, Mr. Crinnian agreed that unventilated plastic bags get very hot in the summer. James Harris was recalled as a witness and testified that the temperature on the night in question ranged between the mid-twenties and thirties.

Richard Campbell testified that he was an explosives expert for the ATF and that the metal piece collected by Deputy Harris was the shell from a shock tube detonator. He said the characteristics of the shell were consistent with a Dyno-Novel detonator. He said that his report documenting his findings regarding the explosion on January 16, 2000, indicated that the explosion was consistent with being caused by an improvised explosive weapon. He said the device was in direct proximity to the victim when it was exploded. He said he believed that the device used in the victim's death was an explosive bomb and that it was used as a weapon. He said that his investigation revealed that Rutledge Smith was employed by Bullseye Drilling and Blasting Company, that Mr. Smith had worked on the blasting of a sewer line in 1999, and that dynamite had been used on the project.

Agent Campbell testified that by examining the victim's car after the explosion, he determined that the driver's side door was open and that the passenger side door was closed when the explosion occurred. He said he determined the explosion started in the front of the car because the seats had been pushed backwards by the blast and the roof had been blown behind the car. He said that tearing of the car was greater on the driver's side, indicating that the dynamite was closer to the driver's side of the car when it exploded. He said that because of the shape of the emergency brake handle after the explosion, he determined that the dynamite was directly above the brake when it was ignited. He said the emergency brake was located slightly to the right of the driver's seat. He said parts of the blasting cap could have easily been missed by officers not trained in explosives. He said that a shock tube was widely used for detonations because of its safety. He said an explosive with a shock tube used for detonation could not be triggered by pulling or hitting it with a hammer. He said that just because a detonation device was not found at the site of the explosion does not mean that one was not used because these devices are often not found after an explosion, especially when untrained officers are conducting the search.

Agent Campbell testified that the victim's body indicated she was in direct proximity to the explosive device. He said that the charred side of the victim's body indicated the portion of her body that was closest to the explosive device. In contrast, the front of the victim's body had flesh ripped away but was not charred. He said the damage to the victim's arm indicated that the starting point of the explosion was below her elbow. He said the pictures taken of the defendant's left arm showed that his top two fingers were protected, indicating that his hand may have been in a fist when the explosion occurred. He said he believed the explosion was caused by a detonation device, not because the dynamite was unstable. He said he believed the explosion was a criminal purposeful act. He said that the damage to the victim's body indicated that the point of the explosion was about twelve inches from her. He said that the damage to the victim's palm indicated a defensive posture. He said that because of the driver's side door's positioning after the explosion, he determined that it had been open when the explosion occurred. He said that this indicated that the victim was trying to escape before the dynamite exploded because she would not have had time to open the door once the dynamite was ignited. He said pictures of the defendant's forearm after the explosion indicated that he may have been holding it against the victim's body at the time of the explosion. He said he believed the defendant had distanced himself from the spot where the explosion began because the burns to the defendant's arm indicated that it was extended.

On cross-examination, Agent Campbell testified that the means of initiation of the explosion were never determined. He said that the shock tube may not have had anything to do with the detonation of the dynamite. He said he determined that a crime was committed in this case because of the location of the blast in relation to the defendant's and the victim's bodies and to the vehicle. He said he also took into account the victim's statements and the lack of statements by the defendant. He said he did not believe the explosion was an accident given the defensive posture of the victim and the attack posture of the defendant. He acknowledged that he did not become involved with the case until a year after the explosion. On redirect examination, Agent Campbell testified that the temperature on January 17, 2000, ranged from twenty degrees to fifty-seven degrees Fahrenheit.

Rutledge Smith testified that the defendant was a friend of his and that he worked for Bullseye Drilling and Blasting Company from March through June of 1999. He said he took five or six sticks of dynamite and three blasting caps from Bullseye and gave them to the defendant. He said that the victim saw him give the dynamite to the defendant. He said that on January 16, 2000, at about 2:30 p.m., he saw the defendant and that he seemed normal. He said that around 6:00 p.m. that evening, he saw the defendant and the victim together and that they both appeared normal at that time. On cross-examination, Mr. Smith acknowledged that he had been convicted of theft under five hundred dollars on June 12, 2000. He acknowledged that he was good friends with the defendant. He said he stole the dynamite from Bullseye on the day that they fired him.

Raymond Funderberg testified that he had been involved with the disposal of explosives for the military for twenty years, that he was an instructor at a hazardous device school that trained civilian bomb technicians, and that he had blown up more than three hundred cars. He said he studied the January 16, 2000 explosion and determined that it started a few inches closer to the passenger side of the car than Mr. Crinnian had testified. He said that if dynamite is not properly designed, manufactured, stored, and transported, it may not be safe. He said he believed that he had been involved in cases where nitroglycerin had leaked from dynamite because of headaches he developed. He also said that if some part of the dynamite evaporated, the dynamite could become either more or less sensitive and that its freezing point could change. He said that a huge difference existed between a nitroglycerin and ethylene glycol compound, and nitroglycerin by itself. He said that if the ethylene glycol evaporated, the nitroglycerin would be much more volatile. He said that he could not determine what caused the dynamite to detonate in the defendant's case. He said he had read a report about another case in which a shock tube had been triggered when a car ran over the shock tube and it was wrapped around the tire. He said that two accidents involving dynamite had occurred when a person jerked on a shock tube detonator. He said that dynamite can leak and that when this happens, it can become dangerous. He said he found no evidence of a device for detonating the dynamite and, therefore, could not determine how the explosion occurred.

On cross-examination, Mr. Funderberg testified that he had received more than sixteen hundred dollars for his work in this case, that he had spent about forty minutes examining the defendant's vehicle, and that he had read approximately ten reports relating to this case. He acknowledged that only an ethylene glycol and nitroglycerin compound residue was found in this case. He said that when his classes blew up cars with dynamite, sometimes things would be missed by the students. He said that even though he suspected a nitroglycerin leak at times when handling dynamite, he had never proven it. He acknowledged that he never went to the scene of the explosion in the defendant's case. On redirect examination, Mr. Funderberg testified that in his experience, when dynamite was detonated, electric blasting caps were often found. On recross-examination, he testified that officers not trained in explosives could easily miss an electric blasting cap in their investigation.

I. SUFFICIENCY OF THE EVIDENCE

The defendant claims that the evidence is insufficient to support a finding that he committed a premeditated murder or that he started the explosion that killed the victim by illegally placing or discharging a destructive device or bomb. The state argues that the evidence is sufficient to convict the defendant of first degree murder under either theory. We agree with the state.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

A. Premeditated Murder

First degree premeditated murder is defined as the unlawful, "premeditated and intentional killing of another." T.C.A. §§ 39-13-201, -202(a)(1). Premeditation is defined as

> an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(d). The element of premeditation is a question for the jury and may be established by proof of the circumstances surrounding the killing. Bland, 958 S.W.2d at 660. Our supreme court has delineated the following factors that demonstrate the existence of premeditation: the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, declarations by the defendant of an intent to kill, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, and calmness immediately after the killing. Id.

Viewed in the light most favorable to the state, we believe the evidence is sufficient to support the defendant's conviction for first degree premeditated murder. Rutledge Smith testified that he gave dynamite to the defendant. Chris Reagan testified that the defendant told him that he was having marital problems and that he believed the victim was having an affair. Chris Taylor also testified that the defendant was upset because he believed the victim was having an affair. The victim's mother testified that she believed the victim was going to leave the defendant. Ronald

Bowers testified that while the defendant was in jail after the explosion, the defendant told him that the victim deserved to die because she was having an affair with an African-American.

In addition, Ruth Reagan testified that she believed that after the explosion, the victim told her that the defendant had meant to detonate the dynamite. Aletha Fletcher said she heard the victim say that the defendant had "done it on purpose." Chris Reagan and Matt Hargis both said that they heard the victim say that she and the defendant were fighting. Several witnesses at the scene of the explosion testified that the victim was screaming from the pain and was afraid she was going to die. Christy Reeder testified that the defendant, unlike the victim, was calm after the explosion and wrapped a cord and a sweater around his arm to control the bleeding. Many witnesses testified that the defendant never inquired about the victim after the explosion.

Agent Campbell testified that the seat of the explosion was closer to the victim, that the injuries to the victim's hand indicated a defensive posture, and that the injuries to the defendant's arm indicated he was holding his forearm against the victim. He said that the victim's door was open before the explosion, which indicated that the victim was trying to escape. He said he believed the explosion was a deliberate criminal act. Dr. Charles Harlan also testified that the injuries to the victim's hand indicated a defensive posture and that the victim was closer to the point of the explosion. Based on the experts' opinions, the victim's statements after the explosion, and the defendant's actions, a rational jury could have found beyond a reasonable doubt that the defendant was upset with the victim because she was having an affair and that he brought the dynamite with him into the car, intending to use the dynamite to kill the victim. The evidence is sufficient to justify a rational juror finding the defendant guilty beyond a reasonable doubt of premeditated first degree murder.

B. Placing or Discharging a Destructive Device or Bomb

Pursuant to T.C.A. § 39-13-202(a)(3), a defendant can be convicted of first degree murder for the "killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb." Subdivision (b) of the statute provides that "[n]o culpable mental state is required for conviction under subdivision (a)(2) or (a)(3) except the intent to commit the enumerated offenses or acts in such subdivisions."

We believe the evidence supports the defendant's conviction for first degree murder through discharging a destructive device. As stated above, Rutledge Smith testified that he gave the defendant dynamite. Ruth Reagan and Aletha Fletcher heard the victim say that the defendant exploded the dynamite on purpose. Debbie Wyckoff testified that a piece of metal found at the scene of the explosion tested positive for a residue found in some types of dynamite. Dr. Harlan testified that the wounds to the victim's body were consistent with wounds found on dynamite victims and that the victim died of these wounds. Bill Crinnian testified that it was unlikely that the dynamite was accidentally detonated, and Agent Campbell stated that he believed the explosion was a purposeful, criminal act. The jury heard the defendant's theory of the case but chose to believe the testimony of the witnesses who supported the state's theory of the case: that the defendant had

dynamite, that he intentionally detonated it with the victim in the car, and that the victim died as a result of the explosion. This is sufficient to show that the defendant killed another by discharging a destructive device as required by T.C.A. § 39-13-202(a)(3). The evidence is sufficient to justify a rational juror finding the defendant guilty beyond a reasonable doubt of killing another as a result of placing or discharging a destructive device or bomb.

II. ADMISSION OF PHOTOGRAPHS OF THE VICTIM

The defendant contends that the trial court erred by admitting graphic photographs of the victim's body taken after the explosion. He argues that the trial court should have excluded the photographs because they are gruesome and only slightly probative of any contested issue in the case and because any probative value was substantially outweighed by the danger of unfair prejudice. See Tenn. R. Evid. 401, 403. The state contends that the photographs were necessary to explain the testimony of the medical examiner and to help prove that the victim's death was not accidental. The state also argues the defendant was not unfairly prejudiced because the trial court used considerable discretion in deciding the type of pictures to allow the jury to see. We agree with the state.

At trial, the state sought to introduce several photographs that depicted the victim's amputated hand and the injuries to her right side. The defendant objected, claiming that the photographs were horribly graphic and inflammatory. The trial court ruled that the photographs were relevant and that their probative value outweighed any unfair prejudice. The trial court, however, did not allow Rebecca Emberton to use the photographs in her testimony, would not admit a photograph of the victim's amputated arm lying on the ground at the scene of the explosion, and did not allow the victim's pubic region to be shown. Also, the victim's face is not shown in any of the photographs.

The admissibility of photographs is a matter committed to the discretion of the trial court and will not be overturned on appeal without a clear showing of abuse of that discretion. State v. Porterfield, 746 S.W.2d 441, 450 (Tenn. 1988). The leading case regarding the admissibility of photographs is State v. Banks, 564 S.W.2d 947 (Tenn. 1978), in which the supreme court held that the admissibility of photographs of murder victims is within the discretion of the trial court after considering the relevance, probative value, and potential unfair prejudicial effect of such evidence. Generally, "photographs of the corpse are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." Id. at 950-51. The probative value of the evidence must be weighed against any unfair prejudice the defendant will suffer in admitting the evidence, and only if the unfair prejudice substantially outweighs the probative value may the evidence be excluded. Id. at 951.

Evidence is relevant when it has any tendency to establish a fact, bearing on the outcome of the action, as more or less probable than without that evidence. Tenn. R. Evid. 401. Specifically, evidence can be relevant if it aids the testimony of the medical examiner. See State v. Bush, 942 S.W.2d 489, 515 (Tenn. 1997) (holding that photographs were relevant to supplement the testimony of the medical examiner and investigative officers in showing the cause of death and the violence

of the attack); see, e.g., State v. Barnard, 899 S.W.2d 617, 623 (Tenn. Crim. App. 1994). In the present case, the state sought to introduce the photographs through the testimony of the medical examiner and used them to explain his statement of the victim's injuries. The medical examiner gave extensive testimony of the victim's injuries, using the pictures to illustrate his points. The photographs also have relevance because they corroborate the medical examiner's testimony that the impact of the explosion on the victim was much greater than the impact on the defendant. This indicated that the victim was closer to the point of the explosion, supporting the state's theory that the defendant was holding the dynamite close to her, a factor in showing the defendant was attacking when the dynamite exploded. Color photographs helped demonstrate the depth of the wounds to the victim, thereby showing a contrast between the victim's and the defendant's injuries after the explosion. The color photographs also showed areas of the victim's body that were spared, which helped to show where the point of the explosion was in relation to the victim's body. Also, the photographs of the victim's amputated hand corroborate Dr. Harlan's and Agent Campbell's testimony that the victim's hand indicated a defensive posture.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Tenn. R. Evid. 403. In weighing the probative value of the photographs against their risk of unfair prejudice, we believe that the trial court did not abuse its discretion in finding that the gruesome photographs did not substantially outweigh their probative value. The pictures do not show the victim's face or pubic region; the trial court did not admit every photograph the prosecution requested to be admitted; and the court did not allow every witness to use the photographs. Allowing the prosecution to show the difference between the victim's injuries and the defendant's injuries was central to the their case, enabling them to show that the point of the explosion occurred closer to the victim. The prosecution was then able to argue that the dynamite's proximity to the victim rather than the defendant, in combination with the defendant's and victim's hand injuries, showed that the defendant was holding the dynamite toward the victim. The prosecution was also able to use the photographs to counter the defendant's argument that the explosion was an accident and that the defendant could not have intended to kill the victim without intending to kill himself at the same time.

The trial court found that the photographs were relevant and that their probative value outweighed any unfair prejudice to the defendant resulting from admitting them. The trial court agreed that certain photographs of the victim and certain parts of some of the photographs would be too prejudicial and did not admit them into evidence. We are unable to conclude that the trial court abused its discretion in ruling that the probative value of the photographs in question was not substantially outweighed by the risk of unfair prejudice.

III. VENUE

The defendant contends that the trial court erroneously denied his motion for a change of venue because pretrial publicity about the case tainted the jurors. He argues that jurors' exposure to an article in The Herald-Citizen before his trial began that reported dying declarations made by the victim unfairly prejudiced him. He also asserts that six other newspaper articles contributed to

the tainting of the jurors. The defendant contends that alleged extraneous information gleaned from pretrial publicity influenced the jurors in this case, denying him a fair trial. The state contends that the defendant has waived this issue by failing to include the voir dire in the record, thereby failing to show that the potential jurors were familiar with the publicity. Alternatively, it argues that the defendant has failed to show that the trial court abused its discretion in denying his motion for a change of venue because he has not shown that the jurors were biased against him.

The decision of whether to grant a motion for a change of venue based on pretrial publicity rests within the sound discretion of the trial court and will not be reversed on appeal unless the trial court abused its discretion. State v. Howell, 868 S.W.2d 238, 249 (Tenn. 1993). Furthermore, the defendant must show that the jurors were biased or prejudiced against him before his conviction will be overturned on appeal. State v. Melson, 638 S.W.2d 342, 360-61 (Tenn. 1982). Generally, mere exposure to news accounts of the incident does not establish bias or prejudice. The test is "whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity." State v. Kyger, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). Because the defendant has failed to include the transcript of the jury selection, we are unable to review whether the jurors were exposed to the publicity or were biased against the defendant.

The defendant relies upon State v. Hoover, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979), to argue that the timing, content, and pervasiveness of the publicity along with the severity of the offense charged support a change of venue. We note that Hoover also listed seventeen factors to consider when deciding whether a change of venue is proper, including the "care exercised in selecting a jury," the "ease or difficulty in selecting a jury," the venire's "familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire." Id. The absence of the voir dire in the record prevents us from assessing these factors. In the absence of a complete record, we must presume that the trial court correctly denied the motion for a change of venue. See State v. Burton, 751 S.W.2d 440, 451 (Tenn. Crim. App. 1988) (presuming that the jury was fair and impartial when the defendant failed to include the transcript of voir dire).

In any event, the defendant has failed to provide any evidence that the trial court's denial of his motion for a change of venue "utterly corrupted" his case. See Dobbert v. Florida, 432 U.S. 282, 303, 97 S. Ct. 2290, 2303 (1977). In Dobbert, the United States Supreme Court stated that "extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair," and the court may not presume unfairness based solely upon the quantity of publicity "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'" Id. (quoting Murphy v. Florida, 421 U.S. 794, 798, 95 S. Ct. 2031, 2035 (1975)); State v. Grooms, 653 S.W.2d 271, 274 (Tenn. Crim. App. 1983) (affirming the denial of a change of venue when the publicity had greatly decreased by the time of trial). Corruption of the trial atmosphere can result from inflammatory publicity immediately before trial or from the influence of the news media pervading the proceedings "either in the community at large or in the courtroom itself." Murphy, 421 U.S. at 798-99, 95 S. Ct. at 2035. On the other hand, the court will not presume that the jury's exposure to news reports regarding the defendant's prior convictions or the charged offense without more deprives the defendant of due process. Id. at 799, 95 S. Ct. at 2036.

In the present case, although The Herald-Citizen carried an article that reported an assistant district attorney's claim that the victim had made statements before she died, the defendant does not show what portion of the jury venire was exposed to the article or even what percentage of the population of Overton County subscribes to The Herald-Citizen. Furthermore, the information contained in the article corresponds to the testimony given at the defendant's trial. This information does not rise to the level that we may conclude that the jurors were tainted. The defendant also contends that six other articles that pertained to the January 16, 2000, explosion and the victim's subsequent death contributed to a corruption of the jury. An article appearing in The Herald-Citizen on January 18, 2000, stated that the explosion had occurred and that the defendant was being investigated. An article from February 15, 2000, reported that the defendant had been charged with first degree murder and was recovering from injuries sustained during the explosion. The article also stated that it was alleged that the defendant and the victim had been fighting before the explosion. Two small articles reported only that the defendant had been indicted for first degree murder after his wife had been killed in an explosion. The final two articles mentioned procedural remarks at hearings by the defendant and the trial court judge. After reviewing these articles, we believe that they did not cause or contribute to an "utter corruption" of the trial atmosphere. The trial court did not abuse its discretion in denying the defendant's motion for a change of venue.

IV. JURY SELECTION EXPERT

The defendant contends that the trial court erred by denying his motion for the appointment of a jury selection expert to assist in the case. He asserts that he had a particular need for one because the expert could have helped select jurors who were not biased because of the pretrial media coverage. The state again contends that the defendant has waived this issue by failing to include the voir dire in the record, thereby failing to show the need for a jury selection expert.

When the need for expert services touches upon a due process concern, a trial court may order such services in non-capital cases. See State v. Harris, 866 S.W.2d 583, 585 (Tenn. Crim. App. 1992). To obtain expert services, a defendant must demonstrate a "particularized need." The determination as to the sufficiency of the showing lies within the discretion of the trial court. State v. Evans, 838 S.W.2d 185, 192 (Tenn. 1992) (stating that the trial court did not abuse its discretion in denying investigative services).

In the present case, the defendant failed to make a showing of a "particularized" need for a jury selection expert. He baldly asserts that extensive pretrial media coverage created a particularized need for a jury selection expert. Because the defendant has failed to include the transcript of the jury selection, however, we are unable to review whether the jurors were exposed to the publicity or were biased against the defendant such that a jury selection expert was necessary to have prevented prejudice against him. Moreover, the defendant has failed to allege any facts showing that the denial of a jury selection expert had a prejudicial effect on his defense. Nothing in the record exists to show that a jury selection expert would have benefitted the defendant. We conclude that the trial court did not abuse its discretion in denying funding for the services in question.

V. JURY QUESTIONNAIRE

The defendant contends that the trial court erred by not using the jury questionnaire that he submitted to the court prior to jury selection. He claims that prospective jurors should have been required to fill out a questionnaire that included a section inquiring as to whether they knew about the defendant's case through the media. The state again asserts that the defendant has waived this issue by failing to include the voir dire in the record, thereby failing to show that he was prejudiced when the court chose not to use his questionnaire.

The control of the voir dire is within the sound discretion of the trial court and will not be found to be error unless the defendant shows that he was prejudiced. State v. Howell, 868 S.W.2d 238, 247 (Tenn. Crim. App. 1993). As stated above, because the defendant has failed to include the transcript of the jury selection, we are unable to review whether the jurors were exposed to the publicity or were biased against the defendant to the extent that not using the defendant's questionnaire prejudiced his case.

In any event, the trial court permitted the majority of questions from the defendant's proposed questionnaire. In addition, the questionnaire submitted to the jury provided a list of names and asked whether the potential juror had a connection with any of the people listed, which included all the witnesses that testified in the defendant's case. The only questions the court did not submit in the questionnaire to the potential jurors pertained to specific knowledge about the defendant's case. At the hearing on the defendant's motion for a new trial, the trial judge explained that she was concerned that if she included specific questions about the defendant's case, potential jurors might have endeavored to find out the details of the case before they were questioned by the parties. Our supreme court has ruled that the "ultimate goal of voir dire is to insure that jurors are competent, unbiased, and impartial . . . ." State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994). The trial court decided that a potential juror may be more likely to find out extraneous information on the defendant's case if the questionnaire informed him about the defendant's case before trial. The defendant has failed to provide any information demonstrating that he was prejudiced because the trial court did not use his jury questionnaire. The trial court did not abuse its discretion by using a questionnaire that did not ask potential jurors specific questions about their knowledge of the defendant's case.

VI. DYING DECLARATIONS

The defendant contends that the trial court erred by allowing Ruth Reagan, Aletha Fletcher, Chris Reagan, and Matt Hargis to testify as to what the victim said after the explosion. He concedes that the victim's statements qualify as dying declarations but asserts that they should not have been admitted because their probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The state claims that the issue is waived because there is no record of any pretrial hearing in the record on this issue. In the alternative, the state argues that nothing justifies the extraordinary relief that the defendant requests.

It is the duty of the appellant to prepare a record that conveys a fair, accurate, and complete account of what transpired in the trial court with respect to the issues that form the basis of the appeal. T.R.A.P. 24(b); State v. Miller, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987). Generally, when the record fails to include relevant proceedings or documents, we must presume the trial court's ruling on the issue to be correct. State v. Bennett, 798 S.W.2d 783, 789-90 (Tenn. Crim. App. 1990). In the present case, when Ruth Reagan testified about the victim's statements after the explosion, defense counsel stated that he was objecting for the record but that the court had already ruled on the issue, indicating that a hearing on this issue had already been held. The record before us, however, does not include any record of a previous ruling on this issue. Without a record of the proceedings regarding the victim's statements, we must presume that the trial court ruled correctly based on the facts presented at that hearing.

In any event, the evidence presented at trial does not support the defendant's claim that the victim's statements' probative value was substantially outweighed by their prejudicial effect and, therefore, that the trial court should not have allowed testimony on what the victim said before she died. The defendant cites Neil P. Cohen, et al., Tennessee Law of Evidence § 8.35[3] (4th ed. 2000), which states, in pertinent part, that when the declarant's death is imminent and that person knows it, "he or she may be less than lucid, due to a bullet in the head or an obvious psychological strain. In extraordinary circumstances Rule 403 may be applicable. The probative value of the statement may be slight, while the danger of unfair prejudice may be substantial." Here, there is nothing in the record to indicate that the victim was not "lucid" when she made her statements. In addition, the probative value of the victim's statements was not slight. Her statements helped establish that dynamite caused the explosion and that the defendant had intentionally exploded the dynamite. The trial court did not err by allowing testimony about the victim's statements after the explosion.

VII. DR. CHARLES HARLAN'S TESTIMONY

The defendant contends that the trial court erred by allowing Dr. Harlan to testify as to where the dynamite was exploded in relation to the victim's body because this testimony was not within his area of expertise. The state contends that Dr. Harlan's testimony was within the purview of his expertise and that, in the alternative, any error in allowing the doctor's testimony was harmless because the defendant's expert essentially agreed with Dr. Harlan.

The admissibility of expert testimony is a matter within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion that is prejudicial. State v. Tizard, 897 S.W.2d 732, 748 (Tenn. Crim. App. 1994). Rule 702, Tenn. R. Evid., states, "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Rule 703, Tenn. R. Evid., states, in pertinent part, that "[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness."

The record does not reflect that Dr. Harlan's testimony about the distance between the victim and the point of the explosion was within the scope of his expertise. Dr. Harlan testified that he was a forensic pathologist and that he had performed between twelve and fifteen autopsies in which dynamite was related to the cause of death. The state did not establish, however, that Dr. Harlan had experience with dynamite so as to have knowledge about the extent of injuries caused by dynamite at specific distances. For example, he never testified as to how his training or experience gave him the requisite knowledge to determine dynamite's impact on an object from one foot verses its impact at ten feet. Dr. Harlan had the expertise only to evaluate the injuries caused by the dynamite, not the characteristics of the dynamite itself. We believe the trial court erred by allowing this portion of the doctor's testimony.

In any event, although the trial court erred by allowing Dr. Harlan to testify on the distance between the victim and the point of the explosion, we conclude that the error was harmless. Dr. Harlan testified similarly to the defense expert, Dr. Funderberg. Dr. Funderberg testified that the only difference between his conclusions and Dr. Harlan's was that he would have estimated the point of the explosion to be a couple inches further to the right of the victim. Both agreed that the explosion started in the front, middle section of the car. Thus, the jury would have been given the same information about the location of the explosion even if Dr. Harlan had not been allowed to testify on this issue. Given that the jury heard the same information from the defense expert, we do not believe that the jury's hearing Dr. Harlan testify about the location of the dynamite relative to the victim more probably than not affected the result of the trial. See T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

VIII. AGENT RICHARD CAMPBELL'S TESTIMONY

The defendant contends that the trial court erred by allowing the state's witness, ATF Agent Richard Campbell, to testify after he remained in the courtroom during the trial in violation of the rule of sequestration. The state responds that any error in allowing Agent Campbell in the courtroom was harmless. The state's brief provides that the state acknowledges that "this Court has said that the better practice is to allow the witness to testify first so as to not tailor his testimony to that of the previous witnesses." In fact, this court has cited Smartt v. State, 112 Tenn. 539, 551, 80 S.W. 586, 588 (1904), for requiring the prosecuting witness to testify first and has commented that the rule in Smartt was a reasonable limitation on the then-existing statutory provision exempting parties from the rule of sequestration. Mothershed v. State, 578 S.W.2d 96, 100-101 (Tenn. Crim. App. 1978). We note that the statute was repealed in 1991 and replaced by Rule 615, Tenn. R. Evid. See T.C.A. § 24-1-204 (repealed 1991).

The trial court relied upon Rule 615 to allow Agent Campbell to testify. In pertinent part, Rule 615 states the following:

> **Exclusion of witnesses. –** At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. . . . This rule does not authorize exclusion

> of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

We do not believe that Rule 615 affects Smartt's requirement that the state's designated person testify first. We note, though, that Smartt was decided when a testifying defendant was statutorily required to be the first witness for the defense. See Clemons v. State, 92 Tenn. 282, 284, 21 S.W. 525 (1893). The rule in Smartt created a symmetry by preventing either party from having the advantage of a witness being able to conform his testimony with that of other witnesses. See Brooks v. State, 406 U.S. 605, 611, 92 S. Ct. 1891, 1894 (1972). That symmetry was ended in Brooks when the United States Supreme Court held that making the defendant testify first or not at all violated the defendant's right against self-incrimination and right to due process. Id. 406 U.S. at 611 n.5, 92 S. Ct. at 1894-95.

Although the defendant no longer need testify first, we believe the Smartt rule generally remains in effect as shown in Mothershed. We say generally, however, because an expert witness is usually allowed to hear the testimony of other witnesses in order to formulate an opinion or respond to the opinions of other expert witnesses. See State v. Bane, 57 S.W.3d 411, 423 (Tenn. 2001); Tenn. R. Evid 703. In Bane, our supreme court stated that "allowing an expert witness to remain in the courtroom as an 'essential person' generally does not create the risk that the expert will alter or change factual testimony based on what is heard in the courtroom." Id. This necessarily entails the expert testifying after other witnesses. We are mindful that Agent Campbell essentially gave expert testimony.

In any event, the defendant has not specified anything about Agent Campbell's improperly changing his testimony while hearing other witnesses testify. See State v. Sexton, 724 S.W.2d 371, 374 (Tenn. Crim. App. 1986) (holding that absence of evidence that detective changed testimony after hearing other witnesses, failure to testify first did not affect the results). In other words, the defendant has not shown how he was prejudiced by Agent Campbell's presence in the courtroom. The defendant is not entitled to relief on this issue.

IX. ADMISSION OF THE WEATHER REPORT

The defendant contends that the trial court erred by admitting a weather report that he claims is irrelevant because it only states temperatures for Crossville, Tennessee, not Allons, Tennessee, the area where the victim's death occurred. See Tenn. R. Evid. 401. The state claims that the weather report is from Livingston, Tennessee, only five miles from Allons, and that it is relevant to show that temperatures on the night the victim was killed were not low enough for dynamite to freeze. Our review of the record shows that the temperatures listed in the report are, in fact, from Livingston, Tennessee, and we take judicial notice that Livingston is five miles from Allons by road. See Tennessee Public Service Commission, Official Highway Mileage Guide p. 4 (1989); Tenn. R. Evid. 201; State ex rel. Leach v. Avery , 215 Tenn. 425, 387 S.W.2d 346 (1964) (stating that this

court can take judicial notice of the distances between cities). Dr. Crinnian testified that dynamite was more volatile when it was frozen and that dynamite from Dyno-Novel freezes at around twenty-one degrees below zero Fahrenheit. The weather report shows that around the date of the victim's death, the temperature in Livingston ranged from twenty degrees to fifty-seven degrees Fahrenheit. Allons, only five miles from Livingston, was not twenty-one degrees below zero on the night of the explosion. The weather report is relevant to show that the dynamite that caused the explosion was not more volatile because it was frozen on the night the victim died.

X. CONSTITUTIONALITY OF T.C.A. § 39-13-202(a)(3)

The defendant contends that T.C.A. § 39-13-202(a)(3) is unconstitutionally vague because it does not define what constitutes a "destructive device" or an "unlawful placing." The state contends that a normal person would understand what is prohibited by the statute and, therefore, that the statute is not unconstitutional. The state also asserts that because the defendant's conduct clearly falls within the statute, he may not challenge it for vagueness.

As stated above, T.C.A. § 39-13-202(a)(3) provides that one way to commit first degree murder is through the "killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb." Subdivision (b) of the statute provides that "[n]o culpable mental state is required for conviction under subdivision(a)(2) or (a)(3) except the intent to commit the enumerated offenses or acts in such subdivisions."

To survive a constitutional challenge for vagueness, "[a penal] statute must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" State v. Lakatos, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972)). Nevertheless, we do not judge the constitutionality of a statute by theorizing all of its possible applications to determine if any application of the statute could be unconstitutional. Due process does not require that a statute be drafted with absolute precision. State v. McDonald, 534 S.W.2d 650, 651 (Tenn. 1979). A statute may prohibit some conduct with sufficient clarity, although it may be vague if applied to other conduct. State v. Butler, 880 S.W.2d 395, 397 (Tenn. Crim. App. 1994). Thus, absent substantial effect upon the exercise of First Amendment privileges or other fundamental liberties and absent vagueness as to all its applications, a defendant's challenge to a statute is limited to the defendant's own conduct. See State v. Alcorn, 741 S.W.2d 135, 139 (Tenn. Crim. App. 1987). Statutes are to be construed in the light of reason. State v. Netto, 486 S.W.2d 725 (Tenn. 1972).

The gist of the defendant's argument is that the terms "destructive device" and "placing" as used in T.C.A. § 39-15-202(a)(3), are undefined and vague and, therefore, that it is unclear who could be convicted under this statute. The evidence at trial showed that the defendant knew that he had dynamite, a device that everyone considers a "destructive device." In addition, the defendant's conviction for premeditated murder shows that the jury believed that the defendant intentionally exploded the dynamite to kill the victim. A normal person would appreciate that deliberately triggering dynamite to explode is a "placing" or a "discharging." Thus, T.C.A. § 39-13-202(a)(3),

is not unconstitutionally vague with respect to the defendant's conduct. See Alcorn, 741 S.W.2d at 139. The defendant is not entitled to relief on this issue.

XI. MERGER

The defendant contends that his two convictions for first degree murder are not the result of separate offenses and that the judgments should be merged. The state agrees with the defendant. At the sentencing hearing, the trial court ordered that the defendant's two convictions be merged but this order is not reflected on the judgment forms. Our supreme court has directed that when a defendant is charged with two theories of first degree murder, the trial court should instruct the jury to render a verdict on both theories. See State v. Howard, 30 S.W.3d 271, 275 (Tenn. 2000). Yet, "when only one person has been murdered, a jury verdict of guilt on more than one count of an indictment charging different means of committing first degree murder will support only one judgment of conviction for first degree murder." State v. Cribbs, 967 S.W.2d 773, 788 (Tenn. 1998). Merger avoids a double jeopardy problem while protecting the jury's findings. Howard, 30 S.W.3d at 275. Thus, in this case, neither two sentences nor separate judgments of conviction should have been entered, and the one judgment of conviction should reflect the merger of the defendant's convictions for premeditated murder and murder by placing or discharging an explosive device or bomb.

XII. CUMULATIVE ERRORS

Finally, the defendant contends that the cumulative effect of errors deprived him of the right to a fair trial. Having found no substantial errors that would alter the outcome of the case, we view the issue to be without merit.

Based upon the foregoing and the record as a whole, we affirm the judgments of conviction as modified and remand the case for entry of a single judgment for first degree murder.

_____

JOSEPH M. TIPTON, JUDGE